IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 992 of 2002
and
CIVIL APPLICATION NO. 3598 OF 2002

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ORIENTAL INSURANCE CO. LTD

Versus

CHANDRIKABEN W/O KIRITKUMAR MANILAL PATEL

Appearance:
MS MEGHA JANI for appellant/applicant
MR MKM HAKIM for Respondent No. 1
MR DJ BHATT for Respondent No. 2
MR PARTHIV B SHAH for Respondent No. 3
No one appears on behalf of respondent No. 4

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE H.K.RATHOD

Date of decision: 03/09/2002

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE H.K.RATHOD)

Appeal is admitted. Notice of admission is waived by learned Advocates Mr.M.K.M.Hakim, Mr.D.J.Bhatt and Mr.Parthiv Shah for respondents Nos.1, 2 and 3 respectively. With the consent of all the learned Advocates, present appeal is taken up final hearing today.

2. The appellant - Oriental Insurance Co. Ltd. has filed the present appeal, challenging the award passed by the Motor Accident Claims Tribunal (Main) at Baroda, dated 27th November 2001 in M.A.C. Petition No.679 of 1994 whereby the Tribunal has awarded compensation to the claimants of Rs.3,23,000/- together with interest @ 9% per annum from the date of application till realisation with proportionate costs. The Tribunal has also directed that the interim amount of compensation, if any, paid or deposited under the principle of "No Fault Liability" shall be adjusted from the aforesaid amount of compensation awarded in the final adjudication. The Tribunal has further observed that necessary orders as regards investment, apportionment, deficit Court fees, if any, shall be passed after depositing the amount by the appellant Company.

2. Learned Advocate Ms.Megha Jani appearing for the appellant Company has raised the contention that the accident in question occurred on 6th January 1994 and the Policy which has been issued by the appellant Company is of 7th January 1994 and therefore, on the date of the accident, the vehicle in question was not insured by the appellant Company. She also submitted that according to the Policy, the amount of premium of the Policy was paid by the owners to the Insurance Company on 7th January 1994 and therefore, on the date of accident on 6th January 1994, the vehicle in question was not insured with the appellant Company and hence, the appellant Company is not liable to pay any compensation to the claimants. Except this, learned Advocate Ms.Megha Jani has not raised any other contention before us challenging the award in question.

3. Learned Advocates Mr.D.J.Bhatt and Mr.Hakim appearing on behalf of respondents Nos. 2 and 1 respectively, have specifically stated that above such contention was not raised in the written statement and

for clarification of the same, no oral as well as documentary evidence has been produced by the appellant Company before the Tribunal. Both learned Advocates have submitted while supporting the award passed by the Tribunal that, in the advice-cum-receipt, the date of insurance has been mentioned as 6th January 1994. The copy of Exh.54, advice-cum-receipt has been shown to us wherein the effective date is mentioned as 6th January 1994 upto 5th January 1995. Both learned Advocates have also pointed out that in the top portion of the advice-cum-receipt, initially the date was written as 6th January 1994, but subsequently, the same has been changed as 7th January 1994. Both learned Advocates, therefore, submitted that the appellant Company is bound by the act on the part of the agent and when the amount in question had been received by the agent from the owner of the vehicle, then on that date, the insurance has to be given effect to and hence, the date of 6th January 1994 is binding to the appellant Company. Learned Advocate Mr.Hakim has placed reliance on one decision of this Court in the case of Bhal Nalkantha Khadi v. Jayantilal and ors., reported in 1995 ACJ 976.

4. We have considered the submissions made by all the learned Advocates appearing on behalf of the respective parties. The question involved in this case has been examined by the Tribunal in paragraphs 13 and 14 of the said award. The advice-cum-receipt was produced on record at Exh.54 and this advice-cum-receipt shows the effective date and time to be of 6th January 1994 and the accident appears to have taken place on 6th January 1994 at 9.15 a.m. Therefore, the Tribunal has considered the decision of the Rajasthan High Court reported in 1992 ACJ 961 wherein it is held that the insurance Policy has to follow the cover note and if this is accepted, then, the Insurance Policy at Exh.43 has to follow the advice-cum-receipt Exh.54, wherein the effective date is shown to be 6th January 1994. The Tribunal has also examined the merits of the reported case of the Rajasthan High Court in paragraph 13 and ultimately came to the conclusion that in respect of the point which was decided is about the commencement of insurance as shown in cover note and rule is given to the effect that if cover note indicates about the commencement of the Policy on a particular time and date, the same should be taken by the Tribunal.

Thereafter, the Tribunal has examined the facts of the present case in paragraph 14 of the award. The Tribunal has considered that though the owner while providing the material facts with regard to the vehicle

in question in the proposal form has accepted the period of insurance from 7.1.1994 to 6.1.1995, the same cannot be accepted in view of the advice-cum-receipt produced at Exh.54 wherein the effective date and time is shown to be of 6th January 1994. However, the Tribunal has considered that in the Policy also, the effective date is shown to be 7th January 1994 at 11.20 p.m. But, again according to the Tribunal, it is the bounden duty of the Insurance Company to produce some evidence to show as to how variance in date of commencement of the Policy with the date of advice-cum-receipt occurred. The Tribunal has also considered that this point was not raised by the appellant Company in the written statement and this contention was raised by the appellant Company at a belated stage of the proceedings. The Tribunal has also observed that in order to clarify about the variance of date as occurred in the proposal form, and the advice-cum-receipt, no attempt is made by the appellant Company to bring some evidence. The appellant Company could have examined any witness and produce some material on record to show as to what was the exact time and date of commencement of the insurance Policy. The Tribunal, therefore, considered the decision of the Rajasthan High Court reported in 1992 ACJ 961 and also considered the decision of the Orissa High Court in the decision reported in 1994 ACJ 1125. In Orissa High Court case, it is held that when the Insurance Company has failed to make assertion in its written statement about starting of the insurance Policy from particular date, now the Company cannot be heard to say that in this case, the Policy should be held to have started from 7.1.1994. The Act of the agent undoubtedly binds the principal and so far as the agent has issued the advice-cum-receipt Exh.54, according to the Tribunal, in the present case, it cannot be held that since the Policy indicated the commencing date as 7th January 1994 and the accident occurred on the same date, the Company is not liable to pay any compensation. The advice-cum-receipt being the document prepared by the agent of the Insurance Company with regard to the effective date to be 6th January 1994, the same is required to be accepted. The accident occurred on 7th January 1994 and the effective date of the Insurance Policy is 6th January 1994 as shown in Exh.54 and therefore, according to the Tribunal, the Insurance Company is liable to indemnify the owner and the contention which has been raised by the appellant Company cannot be accepted.

5. Exh.54 has been shown to us wherein at the left side column, the effective date is mentioned as 6th January 1994 upto 7th January 1995. Both learned Advocates

Mr.Hakim and D.J.Bhatt has drawn our attention about the top portion wherein the said date is mentioned. We have minutely gone through this aspect where initially the date as 6th January 1994 has been mentioned, but subsequently, instead of 6th, the figure 7th has been written over it. Therefore, considering this aspect, it becomes clear from the advice-cum-receipt which has been issued by the agent of the Insurance Company on 6th January 1994 and the effective date is also mentioned as 6th January 1994 and hence, the appellant Company is dutybound to pay the compensation as the vehicle in question was insured with the appellant Company on the date of the accident.

6. Learned Advocate Mr.Hakim has also pointed out another variation from the document, i.e. the proposal form and Insurance Policy issued by the appellant Company. According to Mr.Hakim, in the proposal form, the date is mentioned as 7th January 1994 and the time is mentioned as 11.20 a.m. However, in the Policy, the time is mentioned as 11.20 p.m. by handwriting. However, this variation is not the explanation by the appellant Company in view of the fact that in the advice-cum-receipt Exh.54, the effective date is clearly mentioned and the time is also mentioned as 11.20 a.m. Therefore, this variation has no effect in the facts of the present case.

7. Learned Advocate Mr.Hakim has relied upon the decision of this Court reported in 1995 ACJ 976 wherein the question was examined with regard to the payment of premium made to the agent and the liability of the Insurance Company. It was a case wherein the owner of the offending vehicle handed over proposal for renewal of insurance coverage and bank draft for the amount of premium to the authorised agent of the insurance Company on 7th August 1984. The Insurance Company received the same from its agent on 13th August 1984 and made coverage of insurance from that date. The accident occurred on 8th August 1984. In such a situation, whether the Insurance Company ought to have issued the Policy effective from 7th August 1994 or not and whether the Insurance Company is liable for the award with respect to the accident that occurred on 8th August 1984 or not. These questions have been examined by this Court and the answer has been given in positive and held that, as the authorised agent of the Insurer received the money as agent of the Insurance Company, the Insurance Company is liable for payment of compensation which has been awarded by the Tribunal.

This Court has examined the relevant provisions of Section 64-VB of the Insurance Act, 1938 in paragraph 8 of the aforesaid judgment. After examining the provisions, this Court has come to the conclusion that the Insurance Company is bound to give insurance coverage from the date of such payment in view of the combined reading of sub-section (2) together with its Explanation and sub-section (4) of the aforesaid statutory provision. The relevant discussion in paragraph 8 of the said judgment is quoted as under:

"8. It would be quite proper to look at Section 64-VB of the Insurance Act, 1938, in that regard. It reads:

"64-VB. No risk to be assumed unless premium is received in advance.--

(1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation.-- Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.

(3) Any refund of premium which may become due to an insured on account of cancellation of a policy or alteration in its terms and conditions or otherwise shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured, and such refund shall in no case be credited to the account of the agent.

(4) Where an insurance agent collects a premium

on a policy of insurance on behalf of an insurer, he shall deposit with, or despatch by post to, the insurer, the premium so collected in full without deduction of his commission within twenty-four hours of the collection excluding bank and postal holidays.

(5) The Central Government may, by rules, relax the requirements of sub-section (1) in respect of particular categories of insurance policies."

It becomes clear from bare reading of the aforesaid statutory provision that the insurance coverage should start from the date of advance payment of the amount of premium whether in cash or by cheque or by money order. The Explanation to sub-section (2) makes that position quite clear. The accepter of the amount of premium if it is paid by postal money order would be the postal department and it would be accepting the money as an agent of the insurance company as it will be deemed to have been received by the postal department on behalf of the insurance company on the date the money order is booked. Sub-section (4) requires the authorised agent to send the proposal form together with the amount received from the proposer to the insurance company within 24 hours from the date of such receipt. It would clearly mean that an authorised agent is authorised to accept the payment of advance premium together with the proposal form from the insured. So far as sub-section (4) is concerned, it is a transaction between the insurer and the agent; the insured (as a third party to the said transaction) is not vitally concerned with it. Once the authorised agent accepts the proposal form with advance premium either in cash or by cheque or by a bank draft, he receives that money as the agent of the insurance Company. So far as the insured is concerned, payment is complete, of course, subject to realisation of the negotiable instrument in question. It would be more so if the payment is made in cash or by a bank draft. It cannot be gainsaid that a bank draft is issued by a bank only on receipt of money from the person taking out such bank draft. Payment by a bank draft would be as good as payment in cash subject to the rider that the amount of a bank draft would be realised a day or two later because of clearing agency. The sum and

substance of this discussion is that, once the authorised agent of the insurer has accepted the proposal form with advance payment of premium in whatever mode available, the insurance company is bound to give insurance coverage from the date of such payment in view of the combined reading of sub-section (2) together with its Explanation and sub-section (4) of the aforesaid statutory provision."

8. In view of the observations made by this Court and considering the facts of the present case that the advice-cum-receipt which has been issued by the agent on 6th January 1994 and the Insurance Policy which has been issued on 7th January 1994 at 11.20 a.m., the Insurance Company was dutybound to make the insurance coverage with effect from 6th January 1994 instead of making it effective with effect from 7th January 1994, which is not correct and contrary to the advice-cum-receipt. The Insurance Company was required to explain whatever discrepancy or variation with regard to the advice-cum-receipt at the time of leading proper evidence before the Tribunal. No such efforts have been made by the Insurance Company to lead any proper evidence before the Tribunal and no explanation has been tendered or given by the Insurance Company before the Tribunal. Therefore, in our opinion, looking to the evidence on record and in absence of the evidence from the appellant Company, the view taken by the Tribunal is right, legal and valid. The Tribunal has not committed any error in coming to such conclusion. The Tribunal has rightly appreciated Exh.54 which was produced before the Tribunal wherein the effective date of the Insurance Policy is mentioned as 6th January 1994. Therefore, according to our opinion, the Tribunal has not committed any error while passing the award and therefore, there is no substance in this appeal and hence, the same is dismissed. No order as to costs.

9. In view of the order passed in the main appeal as above, the Civil Application for stay does not survive and the same is rejected. Rule is discharged.

10. The amount of Rs.25,000/- which has been deposited by the appellant Company before this Court shall be transmitted to the concerned Tribunal forthwith.

11. Learned Advocate Mr.Hakim appearing on behalf of respondent No.2 has filed an affidavit-in-reply on behalf of respondent No.2. Learned Advocates Mr.Hakim and

Mr.Bhatt appearing on behalf of respondent No.1 point out that respondent No.1 is already married and having two children. Though the order has been passed by this Court directing the appellant Company to deposit the entire amount of compensation together with interest and costs, learned Advocate Ms.Megha Jani, learned Advocate appearing on behalf of the appellant Company is not able to make a clear statement as to whether the amount in question has been deposited before the Tribunal or not. However, considering the facts of the case, the appellant is directed to deposit the entire amount of Rs.3,23,000/together with 9% interest per annum from the date of application till realisation before the Tribunal with costs, within a period of four weeks from today. As and when such amount of compensation is deposited by the appellant Company before the Tribunal, the Tribunal is directed to pay 40% (forty percent) amount to respondent No.1 Chandrikaben, and the rest of the amount of 60% (sixty percent) to respondent No.2 Manilal Gangaramdas Patel by way of Account Payee Cheque, after proper verification.

(Kshitij R. Vyas, J.)

(H.K. Rathod, J.)

Sreeram.